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In The

# Supreme Court of the United States

October Term, 1993

JONATHAN DALE SIMMONS,

*Petitioner,*

vs.

SOUTH CAROLINA,

*Respondent.*

On Writ Of Certiorari To The
Supreme Court Of South Carolina

## BRIEF OF AMICI CURIAE IN SUPPORT OF RESPONDENT: THE STATE OF IDAHO, JOINED BY ARIZONA, CALIFORNIA, CONNECTICUT, ILLINOIS, KENTUCKY, LOUISIANA, MONTANA, NEW JERSEY, NORTH CAROLINA, SOUTH DAKOTA AND TEXAS

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## QUESTIONS PRESENTED

1.

DOES THE EIGHTH AMENDMENT ENTITLE A CAPITAL DEFENDANT TO HAVE THE SENTENCING JURY INFORMED, AS A REASON NOT TO IMPOSE THE DEATH PENALTY, THAT UNDER STATE LAW THE JURY'S SENTENCING ALTERNATIVE OF "LIFE IMPRISONMENT" MEANS LIFE WITHOUT THE POSSIBILITY OF PAROLE?

2.

DID THE TRIAL COURT'S REFUSAL TO INFORM THE JURY THAT PETITIONER COULD NEVER BE PAROLED IF SENTENCED TO LIFE IMPRISONMENT VIOLATE HIS DUE PROCESS RIGHT TO REBUT THE PROSECUTION'S CASE FOR DEATH, WHERE THE STATE ARGUED THAT PETITIONER WOULD POSE A GRAVE RISK OF FUTURE VIOLENCE UNLESS HE WAS EXECUTED, AND WHERE THE JURY SPECIFICALLY ASKED ABOUT THE POSSIBILITY OF PAROLE?

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## INTERESTS OF AMICI CURIAE

The States have a continuing interest in rules of Constitutional law which threaten to make more difficult their responsibility for the enforcement of state criminal laws. The rule urged by Simmons would adversely affect the accuracy of state criminal trials by leading jurors to speculate about future conditions of the defendant's confinement and to do so on the basis of incomplete information and imponderable variables.

## SUMMARY OF ARGUMENT

I. Whether the jury should be instructed that a sentence of life imprisonment without parole may, or may not, be imposed is a question best left to the states. The Due Process Clause does not require the states to give jury instructions based on speculative future possibilities.

II. The sentencing decision in a criminal case is a complex, discretionary process. It cannot be accurately described by statistical studies and such studies should not be accepted as a basis for concluding that it is necessary to instruct the jury about parole possibilities in order to maintain a fair sentencing system.

III. The Due Process Clause does not require the states to follow jury instruction procedures of questionable validity. The instruction proposed by the petitioner is not something that is a fundamental element of a fair trial or sentencing proceeding.

The Eighth Amendment protection against arbitrariness in capital sentencing proceedings does not require that the alternative of a life sentence without possibility of parole be

considered a mitigating factor. An instruction that attempts to predict future parole or clemency conditions does not bear on the defendant's character, the nature of the crime, or other factors that tend to reduce the defendant's personal culpability.

## ARGUMENT

### I.

### The State's Interest In Defining Factors That Have Particular Relevance To Capital Sentencing Decisions Would Be Undermined By A Constitutional Rule Requiring Sentencers To Consider A Sentence of Life Imprisonment Without Parole To Be Permanent Incapacitation And A Reason Not To Impose The Death Penalty.

The Court's decision *California v. Ramos*, 463 U.S. 992, (1983) embodies an important principle respecting the deference owed to state choices about factors relevant to sentencing determinations. In *Ramos*, the Court held that there was no constitutional impediment to informing a sentencing jury of the governor's power to commute death sentences. It was emphasized that beyond limitations designed to curb arbitrariness and to guarantee the accused an opportunity to respond to adverse evidence against him, "the Court has deferred to the state's choice of substantive factors relevant to the penalty determination." 463 U.S. at 1001.

Petitioner theorizes that the constitutional guarantee of due process of law and the Eighth Amendment guarantee against cruel and unusual punishment require that a sentencing jury be informed that a sentence of life imprisonment means no parole. Simmons argues that this result is necessary to insure that the jury receives complete information



about the factors that may bear on a decision to impose the death penalty. To the contrary, however, such an instruction creates the inaccurate impression that a killer such as Simmons will not pose a future threat to society if he receives a life sentence. As the Court pointed out in *Ramos*, "to describe the sentence as life imprisonment *without possibility* of parole is simply inaccurate when, under state law, the governor possesses authority to commute that sentence to a lesser sentence that includes the possibility of parole." 463 U.S. at 1009 (Court's emphasis).

In addition to commutation and clemency, other unpredictable factors such as escape, judicial modification of sentence and violence toward other prison inmates are considerations relevant to future dangerousness in nearly every case. A life without parole instruction would be complete and accurate only if it accounted for an almost unlimited inquiry into such variables. An accurate instruction would thus read something like this:

> You are advised that a life sentence without possibility of parole means the defendant will never be paroled and will be isolated from society, unless his sentence is commuted, unless he is granted clemency, unless his sentence is reduced by judicial action or unless he escapes from prison. While incarcerated, he may pose a risk to other inmates and prison staff, which you may infer from past violent behavior.

Obviously, petitioner does not seek full and accurate instructions about future possibilities. Instead, he asks for a partial, biased disclosure relating to the risks he may pose to the public in the future. Most, if not all, of these future possibilities are highly speculative and would permit juries

to make sentencing decisions on the basis of uninformed guesses.

Furthermore, the argument that jurors should be encouraged to incorporate parole possibilities into the sentencing equation is an argument in effect that jurors should be given a special opportunity to avoid the statutory duty to consider the death penalty based on evidence of aggravating factors, the circumstances of the crime, and the character of the defendant. It is not desirable to divert the focus of sentencing away from questions of personal culpability. Nor is it necessary in order to ensure that the jury is fully advised to instruct on the prospect of permanent incarceration. Parole ineligibility is not the antithesis of future dangerousness. If a jury considers future dangerousness based on the defendant's behavior, it is not necessary that it also be able to consider the possibility that the state may succeed in restraining such behavior in the future in order to answer the question, "Is the defendant likely to be dangerous in the future?" Simmons proposes that he should be able to tell the jury that he may be dangerous in the future but that the state may be able to restrain him. It is just this kind of empirically debatable proposition that the Due Process Clause does *not* address. *See Williamson v. Lee Optical*, 348 U.S. 483 (1955).

Simmons contends that it is a denial of due process when the state has made a future dangerousness argument to keep from him the right to have the sentencer consider *limitations* on future dangerousness. The argument, however, is only superficially appealing. The state's position in Simmons' case was that it is appropriate to predict future dangerousness from past incidents of



dangerous conduct. It does not follow that it may be inferred with comparable reliability that a sentence of life imprisonment is genuinely incapacitating. In *Ramos*, the Court, while recognizing that predictions of human behavior are often essential to the criminal justice process, also recognized qualitative differences among kinds of predictions. *Ramos* leaves it open to the states to conclude that predictions subject to too many uncontrolled variables should be excluded from consideration. Simmons offers a prediction which must depend upon data that cannot be evaluated by the sentencing authority. No mechanism exists by which the jury could be equipped to accurately predict whether the defendant will in fact remain in prison if he is sentenced to life imprisonment and, if he does, whether the risk that he will harm others will be abated. These questions cannot be answered unless the jury knows something about who will consider commutation or clemency, what the criteria will be, whether the defendant will escape from prison, or whether he will successfully attack his sentence on appeal. Predictions of future dangerousness based on past conduct are, on the other hand, based on data known to the jury. As the Court pointed out in *Ramos*, "the instruction [in California] invites the jury to predict not so much what some future governor might do, but more what the defendant himself might do if released into society." 463 U.S. at 1005. Recognition of the jury's ability to make rational predictions based on known behavior should not open the door for a requirement that juries be allowed to speculate wildly about uncontrollable future events.

Petitioner asserts that his request for a jury instruction detailing his non-eligibility for parole under South Carolina law would have been honored "in all but two other comparable states." *See* Petitioner's Brief at 47. In fact, the majority of the death penalty states generally do not instruct their capital juries on the issue of parole eligibility. A majority of these states do not instruct their juries beyond a "plain reading" of that state's death penalty statute. Like the respondent state of South Carolina, the states of North Carolina, Pennsylvania, Texas and Virginia have death penalty statutes providing that the jury decides between death or life imprisonment without further explanation of what "life" means under state law.

Aside from this life or death alternative, the other death penalty states make use of a wide variety of sentencing alternatives.[1] Alabama, Arkansas, California, Colorado, Connecticut, Delaware, Indiana, Louisiana, Missouri, New Hampshire, New Jersey, South Dakota, Tennessee, Washington and Wyoming have adopted a death penalty statute, the plain reading of which gives the sentencing jury the alternatives of death and life without parole (sometimes only for a fixed number of years) or life without the possibility of release. Other states such as Georgia, Idaho, Maryland, Nevada, Oklahoma, and Oregon have the sentencing alternatives of death, life without parole and parole-eligible life. Still other states, such as Florida provide that life without parole is available only for a certain category of murders, but generally provide the sentencing jury with a choice between death and parole-eligible life after serving

[1] See, Petitioner's Brief, footnotes 23-27.



a minimum mandatory sentence. Ohio provides the sentencing jury with the alternatives of death and life with parole after a certain term of years has been served. Illinois provides sentencing alternatives of death, mandatory natural life, under certain circumstances, discretionary natural life, under certain circumstances, or a fixed term of years with parole. In Kentucky the capital jury sentencing alternatives are death, life without parole for a fixed term of years, life, or a fixed term of years.

Despite the diversity seen in the various death penalty sentencing alternatives, most of the death penalty states do not instruct juries on the issue of parole. Most of those death penalty states contacted report that the general rule is to instruct the capital sentencing jury simply by a plain reading of the death penalty statute, or perhaps, a jury instruction that generally echoes the language for the death penalty statute.

In addition to the "plain reading" approach, some states, by court decision and/or state statute, have prohibited the discussion of the offender's eligibility for parole under state law. *See Quick v. State*, 353 S.E.2d 497 (Ga. 1987) (capital jury cannot consider defendant's parole eligibility in sentencing phase)[2], O.C.G.A. Code 17-8-76; *State v. Brown*, 293 S.E.2d 569 (N.C. 1982), *cert. denied*, 459 U.S. 1080, 103 S. Ct. 503 (1982) (trial court's refusal to give capital defendant's requested jury instruction regarding parole eligibility not error); *Francis v. Commonwealth*, 752 S.W.2d 309 (Ky. 1988); *State v. Copeland*,

[2] Since this decision, Georgia has added under O.C.G.A. § 17-10-31.1(9) (Supp. 1993) a sentencing option of life without parole.

530 So.2d 526 (La. 1988), *cert. denied*, 489 U.S. 1091, 109 S. Ct. 1558 (1989); and *Jones v. State*, 843 S.W.2d 487 (Tex. Crim. App. 1992) *cert. denied*, ___ U.S. ___, 113 S. Ct. 1858 (1993), Tex. Code Crim. Proc. Ann. art. 37.07 § 4(a).

On the other hand, at least six other states provide by case law, statute or uniform jury instruction that a capital jury is instructed upon the offender's non-eligibility for parole. Maryland, by its decision in *Doering v. State*, 545 A.2d 1281 (Md. 1988), requires that, upon the capital defendant's request, the trial court must instruct the jury that the defendant is not eligible for parole under state law. Another state, Colorado, under its prior law where a capital sentencing alternative was life with parole eligibility after a fixed term of years, provided the capital jury with an instruction as to what "life" meant under state law. *See* § 17-22.5-104, Colo. Rev. Stat. (1986). New Jersey, in *State v. Martini*, 619 A.2d 1208, 1277-80 (N.J. 1993), allows a capital sentencing jury to be instructed on the offender's status for parole under state law. Oregon provides a jury instruction that explains in detail its capital sentencing options of life without parole and life with parole eligibility after a fixed term of years. Florida now provides a mandatory life term for the murder of a law enforcement officer, and as such, amended its standard jury instruction to reflect parole non-eligibility under this circumstance. *See Standard Jury Instructions – Criminal Cases*, 603 So. 2d 1175 (Fla.1992). Nevada provides by case law that a jury instruction regarding the possibility of pardon or parole is relevant to a capital sentencing hearing. See *Petrocelli v. State*, 692 P.2d 503 (Nev. 1985).



In summary, petitioner's contention that all but two death penalty statutes would require a parole-eligibility instruction is misleading. The simple fact that a death penalty statute uses the term "without parole" does not mean that the jury will not question that issue during its deliberations. In addition to the respondent state of South Carolina, the states of North Carolina, Pennsylvania, Virginia and Texas do not instruct capital juries on the offender's eligibility for parole should the jury so inquire. Prior to adopting a life without parole alternative, Georgia also declined to give a similar jury instruction. Moreover, even those states such as Louisiana which provide a no-parole life sentence as a sentencing alternative, the jury could still inquire as to the actual period of incarceration covered by such a sentence. In *Copeland, supra*, the Louisiana Supreme Court has been consistent in its opinion that a trial judge should avoid any "discussion of future remedial measures" and instead focus the sentencing jury upon the statutory aggravating and mitigating circumstances, *Id.*, 530 So. 2d at 538.

Just as states are free, under our federal system, to choose alternatives to a death sentence and alternative systems for commutation, parole and pardon, so must they be free from a jury instruction which may be inconsistent with or an inaccurate view of the law.

A constitutionally based instructional rule of the kind for which Simmons contends might produce unexpected results in states with parole eligibility statutes. Petitioner's argument is that the sentencing jury is entitled, as a constitutional matter, to consider a state's announced incarceration policy to be a determinant of future dangerousness. If that is so, those states where life sentences can

be affected by parole might well consider the possibility of parole a determinant in *favor* of the death penalty, in which case petitioner would likely claim that his own proposal is unconstitutional.

The Court held in *Caldwell v. Mississippi*, 472 U.S. 320 (1985) that " . . . it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death sentence rests elsewhere." 472 U.S. at 328-329. The Court pointed out that its cases are intended to facilitate the responsible and reliable exercise of sentencing discretion. This purpose is not served by the rule for which Simmons contends. Instead, a jury would be asked to make sentencing determinations on the basis of a misleadingly selected view of the facts. Justice O'Connor pointed out in *Caldwell* that *Ramos* was not meant "to imply that the giving of non-misleading and accurate information regarding the jury's role in the sentencing scheme is irrelevant to the sentencing decision." In *Caldwell*, the problem was that "the prosecutor's remarks were impermissible because they were inaccurate and misleading in a manner that diminished the jury's sense of responsibility." *Caldwell v. Mississippi*, 472 U.S. at 341, O'Connor, J. (concurring in part and concurring in the judgment). *See also, Fleenor v. State*, ___ N.E.2d ___, (1993, WL 334267) (Indiana). A "no parole" instruction would be similarly inaccurate and misleading.



## II.

**Petitioner's Statistically Based Argument For A Particular Legal Policy is Inappropriate**

Simmons proposes that the States be required to follow a particular theory of jury instruction based, in part, on a survey purporting to show that most prospective jurors believe that offenders sentenced to imprisonment are eventually released. This is not the first time it has been suggested that complex discretionary judgments can somehow be measured by the application of statistical techniques and that legal policy can appropriately be made to depend upon the results.

In *McCleskey v. Kemp*, 481 U.S. 279 (1987) it was argued that a study focusing on racial characteristics of the victims of murder was good evidence of a pattern of discrimination in the capital sentencing system of Georgia. The district court found that the study was flawed in several particulars: (1) the questionnaires furnished to participants did not capture the full degree of aggravating circumstances, (2) the researchers had made questionable decisions about how to treat unknown variables, (3) base rate data was flawed, (4) the study lacked information on the race of the victim in cases involving multiple victims or whether plea bargains had been offered, and (5) the trustworthiness of the data had not been established. This Court held that such a study would not be the basis for an inference of discrimination in McCleskey's case. The holding in McCleskey applies in the same way here. It cannot be concluded that the views of other persons studied in South Carolina were those of the jury that sat on the case. To give credence to Simmons' statistical proffer would require reliance on the

groundless inference that Simmons' jurors had the same views about parole as those who were part of the study, an inference the Court expressly refused to draw in *McCleskey*. Furthermore, the record appears to contain no basis for independent evaluation of the validity of methods used in the study and its credibility is therefore unknown.

The difficulty of using statistical data to account for all of the variables that go into a sentencing decision is illustrated by *Gacy v. Welborn*, 994 F.2d 305 (7th Cir. 1993)

> The Constitution establishes a system of jury trials, which necessarily tolerates the shortcomings of that institution. Pointing to one of those shortcomings, no matter how vivid, does nothing to undercut the Constitution's own method.
>
> Professor Zeisel [who tried to study juror comprehension of instructions] did not try to isolate the effect of the state's drafting choices. For all we can tell, the best conceivable exposition would have reduced the misunderstanding rate on question four from twenty-five percent to twenty-four percent, with comparably paltry changes on other questions. The study does not justify chastising the state, as opposed to the Supreme Court or the institution of the jury or the failings of the species.
>
> If the study enabled us to lay some responsibility at the state's doorstep, this still would not permit a federal court to take a blue pencil to a state's jury instructions. 994 F.2d at 312.

A more useful empirical inquiry than that offered by Simmons would have been to investigate qualitatively



whether the jury system consistently produces defensibly accurate results. That should be the underlying concern but Simmons glosses over the real point by his use of statistical data which is of more academic than practical interest. Basing an instructional rule of constitutional dimension on such a foundation would run counter to the precept of *Ramos* that deference is owed to the states on such points.

## III.

## Simmons Seeks To Apply The Due Process Clause and The Eighth Amendment Too Broadly.

The Due Process Clause does not guarantee resort to empirically debatable propositions. *Williamson, supra.* Historically, the Clause has been applied to deliberate decisions of government agents to deprive one of life, liberty or property. Its protections were intended to secure the individual from the arbitrary exercise of the powers of the government. *Daniels v. Williams*, 474 U.S. 327 (1986). The Clause promotes fairness by requiring that appropriate procedures be followed. *Id.* The Court has said that the Due Process Clause protects the individual against two types of government action:

> So-called "substantive due process" prevents the government from engaging in conduct that "shocks the conscience," *Rochin v. California*, 342 U.S. 165, or interferes with rights implicit in the concept of ordered liberty. *Palko v. Connecticut*, 302 U.S. 319.
>
> When government action depriving a person of life, liberty or property survives substantive due process scrutiny, it must still be

> implemented in a fair manner. *Matthews v. Eldridge*, 424 U.S. 319. This requirement has traditionally been referred to as procedural due process. *United States v. Salerno*, 481 U.S. 739, 746 (1987).

The Court has also held that the Due Process Clause is violated when government action offends some principle of justice so deeply rooted in our legal traditions as to be considered fundamental. *Snyder v. Massachusetts*, 291 U.S. 97 (1934). The legal process that is due is that which has received judicial acceptance as an important element of fair proceedings.

These principles do not help Simmons. He presents only a claim that a doubtful instruction should be required as a matter of fundamental fairness. But it is hardly required by the concept of ordered liberty that trial courts in criminal cases give juries incomplete instructions about future possibilities. Nor can it appropriately be said that to fail to instruct juries in this fashion will produce arbitrary sentencing judgments.

Simmons also argues that he was entitled to an instruction that the alternative of a life sentence without parole was a mitigating factor that he was denied an opportunity to present in violation of the Eighth Amendment. This proposition was persuasively answered by the Court of Appeals for the Eleventh Circuit in *United States v. Chandler*, 996 F.2d 1073, 1085 (11th Cir. 1993).

> Chandler . . . suggests that applicable precedent, mandating that a defendant be allowed to introduce evidence relating to mitigating factors, requires that the jury be informed of the possibility that Chandler would receive a life sentence without parole if death was not recommended. The Supreme Court has defined mitigating factors as "any aspect of a defendant's character or record and any of the circumstances of the offense." Lockett v. Ohio, 438 U.S. 586, 604; *See* Skipper v. South Carolina, 476 U.S. 1 (1986). The range of possible sentences that Chandler might receive in the event the jury did not recommend death does not fall within this definition. Accordingly the district court was not required to inform the jury of the possible sentences Chandler might face.



It seems obvious that an unrealized possibility, such as permanent incarceration, cannot be viewed as a mitigating factor. It may not happen. The defendant might be released on parole after a commutation of his sentence. In any case, future parole possibilities, or the lack of them, have nothing to do with the defendant's character or other circumstances that might mitigate the severity of the crime.

## CONCLUSION

Amici urge that the judgment below be affirmed.

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